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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR TYREE HUTCHINSON,

Defendant and Appellant.

D059349

(Super. Ct. No. RIF132260)

APPEAL from a judgment of the Superior Court of Riverside County, Helios J. Hernandez, Judge. Reversed and remanded with directions.

A jury convicted Omar Hutchinson of two counts of murder with special circumstance findings. On appeal, Hutchinson asserts the trial court erred when it failed to hold a *Marsden*¹ hearing to make a judicial determination on his request for new counsel due to ineffective representation by his trial counsel. Based on the California Supreme Court's recent decision in *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*), we

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

agree. Accordingly, we reverse the judgment and remand the case with directions to the trial court to conduct a *Marsden* hearing.

In the event the judgment is reinstated after the *Marsden* hearing, we also address Hutchinson's contentions that several corrections should be made to the judgment, the minute order, and the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The issues before us do not implicate the facts underlying the murders involved in this case; thus we summarily describe them. On August 29, 2006, two deceased men were found in the trunk of a car. Hutchinson and two accomplices were convicted of first degree murder of the two men, with special circumstance findings of multiple murders and murder during the commission of robbery. Hutchinson was sentenced to two life terms without the possibility of parole.

DISCUSSION

I. *Failure to Hold Marsden Hearing*

After the jury's verdict, Hutchinson wrote a letter to the trial court stating that his trial attorney (Ryan Markson) had not provided effective representation, and listing various complaints about Markson's acts or omissions. Prior to sentencing, Markson obtained a continuance to review the letter to determine if there was a conflict in his representation and whether a new trial motion should be filed on Hutchinson's behalf. At the next proceeding, Markson told the court that he was not in a position to objectively evaluate Hutchinson's claims of ineffective representation; there was a conflict of interest; and another attorney should be appointed to evaluate if there were grounds for a

new trial motion premised on ineffective assistance grounds. The court granted his request, and appointed Attorney Christine Juneau to examine whether there were grounds for a new trial motion.

After reviewing the record and meeting with Hutchinson, Juneau informed the court there were no grounds for a new trial motion based on the issues raised by Hutchinson. The court then relieved Juneau and reappointed Markson as Hutchinson's attorney to represent him at sentencing.²

Under *Marsden*, when a defendant requests new appointed counsel due to ineffective representation by current counsel, the trial court must conduct a hearing to provide the defendant an opportunity to explain the reasons underlying his contention that the appointed attorney was providing ineffective representation. (*Sanchez, supra*, 53 Cal.4th at p. 87.) The trial court is required to appoint new counsel if the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel; i.e., if the record shows that the first attorney is not providing adequate representation or that an irreconcilable conflict has developed between the defendant and the attorney so that ineffective representation is likely to result. (*Id.* at p. 89.)

² At the same proceeding when Juneau was relieved and Markson was reappointed, Markson told the court that he had to declare a conflict a second time because Hutchinson had additional complaints about Markson's trial performance that Hutchinson had not discussed with Juneau. The court declined to grant an additional continuance for this purpose, finding that Hutchinson had adequate time to discuss the case with Juneau and Hutchinson was trying to manipulate the system to avoid sentencing.

In the recent *Sanchez* case, the California Supreme Court reviewed the *Marsden* hearing rule and an array of its decisions interpreting the rule. The defendant in *Sanchez* pled guilty while represented by appointed counsel, and then at sentencing the defendant indicated he wanted to withdraw his plea. (*Sanchez, supra*, 53 Cal.4th at pp. 84-85.) The trial court granted a continuance for defense counsel to decide whether conflict counsel needed to be appointed to examine the plea withdrawal issue. At the next proceeding, defense counsel told the court that conflict counsel needed to be appointed, and the court ordered this appointment for the sole purpose of evaluating a plea withdrawal motion. When the proceedings resumed, new counsel told the court there was no basis to move for plea withdrawal, and the court reappointed the defendant's original counsel to represent him at sentencing. (*Id.* at p. 85.)

The *Sanchez* court concluded that this procedure was improper. The high court held that rather than simply appointing new counsel, the trial court was required to hold a *Marsden* hearing to determine if new counsel should be appointed. The *Sanchez* court set forth several directives on the *Marsden* hearing issue, including: (1) a *Marsden* hearing to determine whether to discharge counsel is required only when there is at least some clear indication by the defendant, either personally or through his current counsel, that the defendant wants a substitute attorney; (2) if a defendant requests substitute counsel the trial court must conduct a *Marsden* hearing and give the defendant an opportunity to state any grounds for dissatisfaction with current counsel; (3) if at the *Marsden* hearing the defendant shows his right to counsel has been substantially impaired, substitute counsel must be appointed as the attorney for all purposes; and (4) it is improper to

appoint a substitute or conflict attorney solely to evaluate whether the defendant has a legal ground to withdraw a plea. (*Sanchez, supra*, 53 Cal.4th at pp. 84, 89-90, 92.)

In reaching these conclusions, the *Sanchez* court explained that when a defendant has requested substitute counsel due to ineffective representation by current counsel, the trial court may not delegate its duty to evaluate the claims of ineffective representation to a conflict counsel. The court admonished: " '[D]efense counsel, like the trial courts, should abandon their reliance on counsel specially appointed *to do the trial court's job of evaluating the defendant's assertions of incompetence of counsel* and deciding the defendant's new trial or plea withdrawal motion. . . . '[T]he proper procedure does not include the appointment of "conflict" or "substitute" counsel to investigate or evaluate the defendant's proposed new trial or plea withdrawal motion.' " (*Sanchez, supra*, 53 Cal.4th at p. 89, italics added, some brackets in original.) Further, the court stated the procedure of appointing substitute counsel "to represent defendant on a motion to withdraw his plea in lieu of conducting a *Marsden* hearing—in effect, grant[ed] the defendant's *Marsden* motion without conducting the required hearing." (*Id.* at p. 92.)

Although the case before us involves a new trial motion rather than a plea withdrawal motion, *Sanchez's* holding is applicable here. Notably, the *Sanchez* court referred to *both* new trial and plea withdrawal motions when admonishing the courts to abandon the practice of appointing conflict counsel rather than holding a *Marsden* hearing. (*Sanchez, supra*, 53 Cal.4th at p. 89.) The essential principle set forth in *Sanchez* is that when a defendant requests substitute counsel, the defendant's concerns about his counsel's representation must be reviewed *by the trial court*, and the trial court

cannot bypass this judicial determination by appointing substitute counsel to review defendant's complaints. This principle applies equally in the context of a new trial motion.

The Attorney General contends that the *Marsden* hearing requirement was not triggered here because Hutchinson did not make a specific request for substitute counsel when he raised his claims of ineffective representation. The analysis and holding in *Sanchez* compel a contrary conclusion. *Sanchez* states that the *Marsden* hearing requirement is triggered when there is "some clear indication by the defendant, either personally or through counsel, that defendant wants a substitute attorney." (*Sanchez*, *supra*, 53 Cal.4th at p. 84.) Defense counsel in *Sanchez* told the court that the defendant wished to have counsel explore having his plea withdrawn, and after a continuance, defense counsel told the court that conflict counsel needed to be appointed. (*Id.* at p. 85.) The California Supreme Court concluded that this equated with a request for substitute counsel by defendant's counsel, stating: " 'the trial court's duty to conduct a *Marsden* hearing was triggered by defense counsel's request for appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on Sanchez's behalf.' " (*Id.* at p. 90, fn. 3, bracket in original.) Likewise here, the duty to conduct a *Marsden* hearing was triggered by defense counsel's request for the appointment of conflict counsel to evaluate the filing of a new trial motion on ineffective assistance grounds.

We reverse the judgment and remand the matter to the trial court with directions to hold a *Marsden* hearing to determine whether a failure to replace Hutchinson's appointed attorney would substantially impair his right to assistance of counsel. If the *Marsden*

motion is denied and/or if any new trial motion is denied, the trial court shall reinstate the judgment. (See *Sanchez, supra*, 53 Cal.4th, at pp. 92-93.)

II. Corrections

In the event the judgment is reinstated after the *Marsden* hearing, we address several matters that Hutchinson contends should be corrected.

A. Multiple-murder Special Circumstance

Hutchinson contends the judgment includes two multiple-murder special circumstance findings, whereas only one is proper. He requests that one of the multiple-murder findings be stricken.

In death penalty cases, the California Supreme Court has fashioned the rule that only one multiple-murder special circumstance should be charged and found true to avoid an inflated risk that the jury will arbitrarily impose the death penalty based on the sheer number of special circumstances. (*People v. Allen* (1986) 42 Cal.3d 1222, 1273; see *People v. Garnica* (1994) 29 Cal.App.4th 1558, 1563; *People v. DeSimone* (1998) 62 Cal.App.4th 693, 701.)³ Although this concern is not present when (as here) the death penalty is not sought, it appears that even in noncapital cases the courts adhere to the rule allowing only one multiple-murder special circumstance allegation and finding. (See *People v. Garnica, supra*, 29 Cal.App.4th at pp. 1562-1564 [trial court could properly

³ Penal Code section 190.2, subdivision (a)(3) defines the multiple-murder special circumstance as follows: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: . . . (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree."

impose life without possibility of parole for each murder conviction even though there can be only one multiple-murder special circumstance allegation and finding].) The Attorney General does not dispute that only one multiple-murder special circumstance finding is proper in this case.

Here, the information charged Hutchinson with two multiple-murder special circumstance allegations (one for each murder victim). However, the jury returned *one* verdict form stating that based on the murder convictions in counts 1 and 2, this special circumstance allegation was true.⁴ The single jury verdict form reflects only one multiple-murder finding. In any event, to the extent the judgment can be interpreted as including two multiple-murder special circumstance findings, if the judgment is reinstated we clarify it to reflect only one such finding. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 422.) This clarification has no effect on Hutchinson's sentence.

B. *Victim Restitution*

Hutchinson asserts that the minute order and abstract of judgment should be corrected to accurately reflect the court's order regarding victim restitution. We agree.

The probation report recommended that the court order Hutchinson to "[p]ay restitution \$15,000.00 to the extent the victim received assistance from California Victims Compensation and Government Claims Board (1202.4(f)(2)PC)[.]" At

⁴ The verdict states: "We, the jury in the above-entitled action, find that one or more of the murders, as charged under counts 1 and 2 of the information, was in the first degree and that the defendant . . . committed multiple murders, as alleged in the special circumstance allegation, within the meaning of Penal Code section 190.2, subdivision (a), subsection (3)."

sentencing, the court stated it had received a note from the Victim Compensation and Government Claims Board (Board) setting the amount of restitution at \$14,573.86. Accordingly, the court ordered that amount in victim restitution and said the order was "joint and severally imposed upon all three defendants." The court's minute order states: "Pay \$14573.86 for V-Victim restitution [victim]" The abstract of judgment states that the amount of restitution is \$14,573.86 to "victim(s)."

Hutchinson contends the minute order and abstract of judgment should be amended to include the trial court's order that the restitution amount is owed jointly and severally by Hutchinson and his two codefendants (Franchune Epps and Brooke Rottiers). The Attorney General concedes, and we agree, the joint and several provision should be added to the minute order and abstract of judgment.

Hutchinson further contends the minute order and abstract of judgment should be corrected to reflect the court's order that the victim restitution amount should be deposited into the restitution fund administered by the Board. The Attorney General disputes this interpretation of the court's order, but we agree with Hutchinson. Penal Code section 1202.4, subdivision (f) requires the court to order victim restitution in every case in which a victim has suffered economic loss as a result of the defendant's conduct.⁵ Section 1202.4, subdivision (f)(2) provides for payment of the victim restitution award to the restitution fund when the victim has received assistance from the fund, stating: "Restitution ordered pursuant to this subdivision shall be ordered to be deposited to the

⁵ Subsequent unspecified statutory references are to the Penal Code.

Restitution Fund to the extent that the victim . . . has received assistance from the Victim Compensation Program" The probation report refers to payment of \$15,000 in victim assistance from the Board, and at sentencing the trial court referred to a note from the Board stating the amount of restitution is \$14,573.86. The clear import of this information is that the Board paid this amount in victim restitution, and under section 1202.4, subdivision (f)(2) this restitution amount should properly be ordered to be deposited into the restitution fund.

C. Parole Revocation Fine

As recognized by the parties, the minute order and abstract of judgment improperly include a \$5,000 parole revocation fine pursuant to section 1202.45. The reference to this parole revocation fine should be removed from the minute order and abstract of judgment because the court did not order the fine, and it is inapplicable since Hutchinson received life sentences without the possibility of parole. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

DISPOSITION

The judgment is reversed and the case remanded to the trial court with the following directions.

(1) The trial court shall hold a *Marsden* hearing to determine if a failure to replace Hutchinson's appointed attorney would substantially impair his right to assistance of counsel. The trial court shall reinstate the judgment if the *Marsden* motion is denied and/or if any new trial motion is denied.

(2) If the judgment is reinstated, we clarify that it includes only one multiple-murder special circumstance finding.

(3) If the judgment is reinstated, the trial court shall make the following corrections to the minute order and abstract of judgment: (a) add a provision stating the \$14,573.86 restitution amount is owed jointly and severally by defendant and co-defendants and is to be deposited into the restitution fund, and (b) remove the reference to a parole revocation fine under section 1202.45. The court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.